Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling that	)	
AT&T's Phone-to-Phone IP Telephony	)	
Services Are Exempt from Access Charges	)	Docket No. 02-361
	)	

THE ALASKA EXCHANGE CARRIERS ASSOCIATION, INC.'S COMMENTS IN OPPOSITION TO AT&T'S PETITION FOR DECLARATORY RULING

The Alaska Exchange Carriers Association, Inc. ("AECA"), by and through its counsel, Brena, Bell & Clarkson, P.C., respectfully opposes AT&T Corp.'s ("AT&T") Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges (October 18, 2002) ("AT&T Petition").

I. Introduction.

AT&T seeks a ruling from the Federal Communications Commission ("FCC" or "Commission") that "phone-to-phone" Voice Over Internet Protocol ("VOIP") service is exempt from subscribing to access services and from paying access charges. AT&T Petition at 1. The Commission should decline AT&T's invitation. AT&T's phone-to-phone VOIP service is clearly a "telecommunications service." As such, AT&T should not be permitted to avoid the payment of access charges merely because it chooses to transport voice over its own network using IP. To do otherwise would undermine the integrity of the current access charge system and would allow AT&T and other telecommunications carriers to avoid their regulatory obligation to pay access charges merely because they chose to transport voice over their own networks using IP. To the degree

necessary, access charge reform should be carefully considered by the Commission based on a complete evidentiary record in an appropriate docket. Access charges should not simply be eliminated by technological bypass merely because voice may now be transported using IP.

AT&T also seeks to have the FCC "provide guidance" to the states with regard to how they should regulate intrastate phone-to-phone VOIP telecommunications services. AT&T Petition at 1. The FCC should similarly decline AT&T's invitation to "provide guidance" to the states as to how they should assess intrastate access charges. To do otherwise would disregard the state's role in establishing just and reasonable intrastate access charges.

II. Background.

AECA is an association that administers a common, intrastate access tariff for 18 rural, rate-of-return companies and 2 average schedule companies in Alaska. As part of its administration, AECA assesses intrastate access charges to be paid by interexchange carriers for the use of the member companies' facilities and services when originating and terminating intrastate long distance calls. The access charges assessed by AECA are based on the actual costs to the local exchange carriers of providing their facilities and services to the interexchange carriers for use in providing long distance service. AECA's member companies file detailed revenue requirements of those costs that are reviewed and approved every second year by the Regulatory Commission of Alaska ("RCA").

III. Argument.

A. AT&T is Providing a "Telecommunications Service."

There should be little debate that AT&T is providing a "telecommunications service." In fact, AT&T does not even articulate an argument to the contrary. The Telecommunications Act of

1996 defines "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received."[1] It further defines "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used."[2] AT&T's phone-to-phone VOIP service fits squarely within the definition of "telecommunications service." AT&T is offering to transmit voice communication for a fee between points specified by the user without change to the form or content of the information. It would be hard for one to imagine a clearer example of a "telecommunications service" than AT&T's phone-to-phone VOIP service.

B. AT&T is Not Providing an "Information Service."

While AT&T does not articulate the position that it is providing an "information service," AT&T is requesting this Commission allow its "telecommunications service" to be treated as an "information service" for regulatory and access charge purposes. Accordingly, the Commission should note directly that AT&T is not providing an "information service." The Telecommunications Act of 1996 defines "informational service" to mean "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ."[3] AT&T's phone-to-phone VOIP service does not generate, acquire, store, transform, process, retrieve, utilize, or make available any information whatsoever. Instead, AT&T's service is the simple transport of phone-to-phone VOIP–nothing more and nothing less.

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[1] 47 U.S.C. § 153(43).

[2] Id. § 153(46).

[3] Id. § 153(20).

From any practical perspective, AT&T's phone-to-phone VOIP service is functionally identical to its other long distance telecommunications service.

In considering this very issue, the Commission has looked to the functional nature of the service being provided to determine whether it has the characteristics of a "telecommunications service" or an "information service."[4] With regard to phone-to-phone VOIP, the Commission has specifically noted that (1) the provider holds itself out as providing voice telephony; (2) the customer uses CPE in a similar fashion when placing an ordinary touch-tone call; (3) the customer calls telephone numbers assigned under the North American Numbering Plan; and (4) the customer transmits information without a net change in form or content.[5] Based on these observations, the Commission held that "the record before us suggests that this type of IP telephony lacks the characteristics that would render them 'information services' within the meaning of the statute, and instead bears the characteristics of 'telecommunications services.'"[6]

In so holding, the Commission also specifically considered whether the technical method of protocol processing should be considered when classifying a service as a "telecommunications service" or an "information service." The Commission held the protocol does not determine the underlying nature of the service. With regard to "[t]he protocol processing that takes place incident to phone-to-phone IP telephony," the Commission specifically held that "the protocol processing

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[4] Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11,501 ¶¶ 30, 59, 83-93 (1998) ("Universal Service Report").

[5] Universal Service Report ¶ 88.

[6] Universal Service Report ¶ 89.

does not affect the services's classification, under the Commission's current approach, because it results in no net protocol conversion to the end user."[7]

C. It Would Be Inappropriate to Allow Telecommunications Carriers to Avoid Their Regulatory Obligation to Pay Access Charges Merely Because They Choose to Transport Voice Over Their Own Networks Using IP.

Reduced to its essence, AT&T is requesting this Commission allow telecommunications carriers to avoid their regulatory obligation to pay access charges merely because they choose to transport voice over their own networks through IP. This Commission has previously suggested a contrary conclusion. This Commission has set forth its detailed analysis of the legislative history underlying the Telecommunications Act of 1996. Throughout its analysis, the Commission carefully noted the Congressional intention to continue to regulate providers of "telecommunications services" as telecommunications carriers while at the same time protecting from many forms of regulation providers of "information services."[8] AT&T's suggestion that it be permitted to avoid its regulatory obligation as a telecommunications carrier to pay access charges simply because it may choose to use IP to transport voice over its own long distance system would make an ignominy of the Commission's analysis.

As the Commission noted, "the [Telecommunications Act of 1996] and the Commission's rules impose various requirements on providers of telecommunications, including . . . paying interstate access charges . . . ."[9] Thus, as a "telecommunications carrier," AT&T has a current regulatory obligation to pay interstate access charges for the "telecommunications service" it

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[7] Universal Service Report ¶ 52.

[8] Universal Service Report ¶¶ 21 & 30-48.

[9] Universal Service Report ¶ 91.

provides. Given that telecommunications carriers, including AT&T, have the regulatory obligation to pay interstate access charges, the only remaining question is whether AT&T is a telecommunications carrier providing a telecommunications service when it continues to provide the identical long distance service as before but now uses IP on its own network. The answer seems clear--AT&T should not be permitted to unilaterally modify or eliminate its regulatory obligations as a telecommunications carriers merely by using IP on its own network.

AT&T notably does not consider who will have to pay for the local exchange carrier's facilities and services should AT&T be successful in avoiding the payment of access charges through technological bypass. AT&T suggests that access charges are inflated. Presumably, AT&T's broader point is that no one will have to pay the costs it is attempting to avoid. AT&T's suggestion, however, is a short-sighted one.[10] More to the point, someone has to pay to maintain and provide the facilities and services AT&T and other interexchange carriers use to originate and terminate their long distance service. There are only three practical sources of revenue to cover the costs of such facilities and services: access charges, local rates, and universal service. Ultimately, the access charges AT&T seeks to avoid will simply be borne through higher local rates or through higher universal service support. AT&T has not articulated a reasoned public policy that would support allowing it and other interexchange carriers a "free ride" to use the local exchange carriers' facilities

[10] In Alaska, the revenue requirements for AECA's member companies underlying the intrastate access charge system are reviewed every other year by AT&T and other interexchange carriers. Notwithstanding having greater regulatory scrutiny than the revenue requirements of any other regulated entity within Alaska, there have only been nominal changes to the filed revenue requirements for AECA's member companies. Accordingly, AT&T's suggestion of inflated access charges has certainly not been borne out by the success of its positions before the RCA.

and services when providing their long distance service. Nor has AT&T articulated a reasoned public policy that would support shifting such costs to local rates or to universal service support.

Moreover, AT&T does not consider the competitive disequilibrium that would result from permitting some interexchange carriers to avoid paying access charges merely because they use IP on their networks while requiring others to continue to pay access charges merely because they do not use IP. For the interexchange carriers that use IP, they would have a competitive and price advantage over other interexchange carriers that do not use IP. Once technological bypass of the access charge system were permitted based solely on the use or nonuse of IP, one could reasonably expect every interexchange carrier would be driven to use IP over time. This substantive investment in IP, however, would not be driven by the competitive market forces but by the opportunity to arbitrage the regulatory system through avoiding access charges simply through the use of a particular technology. This is exactly the type of competitive disequilibrium the Commission should be seeking to avoid and not to encourage.

D. Rational Access Charge Reform Would Be Undermined by Granting AT&T's Petition.

This Commission has dedicated a great many resources to considering and effecting access charge reform.[11] Presumably, the Commission has sought and is continuing to seek to strike the right balance for access charge reform within its broader statutory, public policy, legal, and regulatory

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[11] Access Charge Reform, First Report and Order, 12 FCC Rcd. 15,982 ¶ 344 (1997); Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, (Access Charge Reform), FCC 00-193, released May 31, 2000; and Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 & 98-166, (Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers), FCC 01-304, released Nov. 8, 2001.

goals. For good reason, AT&T does not reveal the potential impact on the access charge system from granting its requests. Over time, one could reasonably expect all interexchange carriers to use IP on their own networks, if for no reason other than to avoid paying access charges. Thus, if granted, AT&T's Petition would undermine the Commission's considerable efforts to reform access charges by simply eliminating access charges altogether.

If granted, AT&T's request to allow the technological bypass of the current access charge system would lay a new and faulty foundation for technical regulation based on shifting technologies rather than building upon the existing foundation of substantive regulation based on sound public policy. AT&T's request does not distinguish between rate of return and price cap local exchange carriers, does not distinguish between rural and competitive marketplaces, does not distinguish among the various individual circumstances of the several states, and does not maintain the current distinction between "telecommunications service" and "information service." In short, AT&T's request would simply shift access charges away from AT&T and allow it a "free ride" without building upon the substantive public policies currently underlying telecommunications. Simply stated, AT&T's request is regulatory gamesmanship and does not advance substantive regulation based on sound public policy.

E. The Commission Should Decline to Provide "Leadership" and "Guidance" to the States on Pricing Intrastate Access Charges.

AT&T suggests the Commission should provide "leadership" and "guidance" to the states on pricing intrastate access charges. AT&T Petition at 1, 21-24. AT&T suggests such "leadership" and "guidance" is necessary because various states have adopted different approaches to intrastate access charges. Id. While AT&T is couching its request as a request for federal "leadership" and

"guidance" it appears more likely that AT&T is actually requesting the Commission act to preempt continuing state regulation of intrastate access charges. While not expressly stated, AT&T is substantively requesting its phone-to-phone VOIP be considered for federal regulatory purposes as an "information service." Since the states are preempted from regulating or assessing intrastate access charges on an "information service," if AT&T is successful, the RCA and every other state regulatory commission would be preempted from continuing to assess intrastate access charges. This would mean that the several states would lose the regulatory authority over intrastate access charges, local exchange carriers would substantially under recover their intrastate revenue requirements, and interexchange carriers would have the free use of the local exchange carriers' facilities and services for originating and terminating intrastate long distance calls.[12] Thus, the Commission should exercise its sound discretion and decline to provide such "leadership" and "guidance."

The states and not the Commission should provide the necessary "leadership" and "guidance" with regard to intrastate matters. States and not the Commission have the authority to determine the circumstances and rates for intrastate access charges for the telecommunications services provided

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[12] On behalf of its member companies, AECA collects approximately $31.8 million per year from the interexchange carriers for their use of member companies' facilities and services in originating and terminating intrastate long distance calls. This amount compensates the member companies for their costs in providing their facilities and services to the interexchange carriers. Should AT&T's request be granted, the interexchange carriers in Alaska may be expected to begin to use IP to transport voice over their networks. In such an event, the RCA would lose regulatory authority over intrastate access charges, and AECA's member companies would no longer be able to recover the $31.8 million that it costs them to provide their facilities and services to the interexchange carriers. The result would be an intrastate revenue deficiency of $31.8 million for AECA's member companies. To fully recover their intrastate revenue requirements, AECA's member companies would have no choice but to substantially increase local rates or substantially increase their requests for state universal service support. In either case, customers would have their intrastate rates substantially impacted merely to allow the interexchange carriers the free use of the facilities and services of AECA's member companies.

within their states. Congress did not attempt to nor did it preempt the states' inherent constitutional authority over intrastate matters.[13] For that matter, Congress even left the local competition provisions of the Telecommunications Act of 1996 to the authority and discretion of the states.[14] Thus, the states and not the Commission are properly charged with the responsibility to set intrastate rates in general and intrastate access charges in particular. Under these circumstances, the Commission should respect the right of the states to independently consider and establish intrastate access charges.

Moreover, AT&T overstates the conflict and the import of the conflict among the states on these issues. AT&T states but does not support the need for a uniform rule governing intrastate access charges among the several states. As it stands today, each state has its own approach to intrastate access matters. In short, there is simply nothing broken that need be fixed by the Commission with regard to intrastate access charges.

Finally, AT&T cites Florida[15] and Colorado[16] as states that have declined to authorize the assessment of access charges on phone-to-phone VOIP and New York[17] as a state that "reached a

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13 Iowa Utils. Bd. v. FCC, 120 F.3d 753, 796 (8th Cir. 1997) (holding that the FCC lacks authority to determine intrastate rates), cert. granted, 522 U.S. 1089 (1998).

14 Id.

15 Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996, No. 000075-TP (Fl. Pub. Serv. Comm'n May 31, 2001) ("Florida PSC Decision").

16 Petition by ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with US West Communications, Inc., No. C00-858 (Colo. Pub. Util. Comm'n Aug. 1, 2000) ("Colorado PUC Decision").

17 Frontier Tel. of Rochester v. US DataNet Corp., No. 01-C-1119, 2002 WL 31630846, at *5 (N.Y.P.S.C., May 31, 2002) ("New York PSC Decision").

different conclusion." AT&T Petition at 21-23. Importantly, both the Colorado PUC and the Florida PSC considered access charges within the context of Sections 251 and 252 of the Telecommunications Act of 1996. Importantly, neither the Colorado PUC nor the Florida PSC endorse the avoidance of access charges through the use of IP technology. As the Colorado PUC stated, under a freely negotiated interconnection agreement in a competitive marketplace, the interconnection agreement "would likely provide for compensation" for the "actual cost" VOIP imposed on the network.[18] Essentially, the Florida PSC adopted staff's suggestion to defer the decision. In making its recommendation, however, the Florida PSC staff stated, "the technology used to deliver the call, whether circuit-switching or IP telephony, should have no bearing on whether reciprocal compensation or access charges should apply. Nevertheless, staff believes that a broad sweeping decision on this particular issue would be premature at this time."[19]

Finally, after a detailed review of the FCC's analysis of the phone-to-phone VOIP, the New York PSC was quite clear in holding that such a service is a "telecommunications service" for which access charges must be paid. Specifically, the New York PSC held:

> Accordingly, we conclude that the service provided by DataNet is simple, transparent long distance telephone service, virtually identical to traditional circuit-switched carriers. Its service fits the definition of 'telecommunications' contained in the 1996 Telecommunications Act and is not 'information service' or 'enhanced service.' Thus, its traffic is access traffic just like any other IXC's traffic. We also conclude that DataNet imposes the same burdens on the local exchange as do other interexchange carriers and

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[18] Colorado PUC Decision at 10.

[19] Florida PSC Decision at 107 (underscore added).

> should pay all applicable and appropriate charges paid by other long distance carriers, including access charges.[20]

AT&T has had to stretch to suggest that the decisions by the Colorado PUC, the Florida PSC, and the New York PSC create a conflict among the states that requires "leadership" and "guidance" by the Commission to resolve. More correctly stated, the rulings by the states have, for the most part, correctly identified and applied the Commission's tentative analysis of phone-to-phone VOIP. It seems more likely that AT&T does not agree with the clear analysis emerging from the states and is seeking to avoid the legal result of the states' clear analysis.

F. The Current Regulatory Obligations of Telecommunications Carriers Should be Enforced Until Such Time as Those Obligations are Changed.

AT&T suggests that its current obligation as a telecommunications carrier to pay access charges would somehow be suspended in the event it begins to use phone-to-phone VOIP over its own network. To the contrary, AT&T's current regulatory obligation is to pay access charges for the telecommunications service it provides. Since phone-to-phone VOIP is a telecommunications service, AT&T is legally obligated to pay access charges until such time as the Commission acts to change its current obligations.

IV. Conclusion.

Phone-to-phone VOIP is a long distance "telecommunications service" that uses the facilities and services of the local exchange carrier in the same fashion as traditional switched service. The Commission should decline AT&T's invitation to allow interexchange carriers to avoid access charges by merely using IP on their own long distance networks. The Commission should also decline to provide "guidance" to the states who are properly ruling that phone-to-phone VOIP is a

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[20] New York PSC Decision at 5.

telecommunications service and should be regulated as one. Regulation should be based upon sound principles of public policy and not upon shifting technologies and regulatory arbitrage, as AT&T proposes. Regulatory reform of access charges, to the degree necessary, should be carefully considered based on a complete factual record within appropriate dockets and not based upon the mere use of IP on AT&T's long distance network. For the reasons set forth above, the Commission should deny AT&T's Petition.

DATED this 18th day of December, 2002.

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